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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 KELON MICHEAL WILLIAMS,

11 Petitioner,

No. CIV S-04-2284 GEB DAD P

12 vs.

13 D.L. RUNNELS, et al.,

14 Respondents.

ORDER

15 _____/
16 Petitioner is a state prisoner proceeding pro se with this action. Respondents have
17 filed an answer to petitioner's amended petition. Petitioner has not filed a traverse despite the
18 fact that respondents' answer includes a motion to dismiss the petition on the ground that it
19 contains an unexhausted claim.

20 BACKGROUND

21 In the habeas petition filed on October 27, 2004, petitioner alleged three grounds
22 for relief and affirmatively alleged that one of them had not been presented to the state courts. It
23 appeared to the undersigned that petitioner had not presented either his second or his third ground
24 for relief to the state courts. The undersigned dismissed the mixed petition with leave to file an
25 amended petition containing only exhausted claims. Petitioner filed an amended petition on
26 December 9, 2004, alleging two grounds for relief.

1 On December 29, 2004, the undersigned reviewed petitioner's amended petition
2 and made the following observations:

3 Petitioner was advised to raise only the claim or claims presented
4 to the California Supreme Court on direct appeal. Petitioner was
5 directed to file a motion to stay along with his amended petition if
6 he wishes to stay this case while he exhausts additional claims in
7 state court. In the amended petition before the court, petitioner . . .
8 alleges two grounds for relief: (1) his conviction was obtained
9 through a confession that resulted from an unlawful custodial
10 interrogation, and (2) his conviction was obtained in violation of
11 the protection against double jeopardy. Petitioner has not filed a
12 motion to stay the action.

13 Although petitioner has deleted his unexhausted claim of
14 ineffective assistance of counsel, he has not deleted his double
15 jeopardy claim. In his original petition and his amended petition,
16 he describes only one claim raised in the California Supreme
17 Court. (See Pet. & Amended Pet. at page (3), describing the single
18 claim presented to the California Supreme Court on direct appeal.)
19 The amended petition may be a mixed petition containing one
20 exhausted claim and one unexhausted claim. On the present
21 record, the court is unable to determine whether petitioner has
22 alleged only exhausted claims. The amended petition will be
23 served on respondents so that a record can be made.

24 (Order filed Dec. 29, 2004, at 2.)

25 RESPONDENTS' MOTION

26 In their answer, respondents assert that the only claim petitioner has presented to
the California Supreme Court involved the allegation that his conviction was obtained through
the admission of an unlawful confession. (Resp'ts' Answer at 2 & 15.) In support of this
assertion, respondents have lodged a copy of the petition for review that was submitted to the
California Supreme Court. Petitioner has not disputed respondents' argument or evidence.

In light of petitioner's failure to comply with the court's November 8, 2004 order
and his lack of opposition to respondents' motion, the court will dismiss the amended petition as
a mixed petition and grant petitioner leave to file a second amended petition alleging only the
exhausted claim concerning petitioner's confession. (See Order filed Nov. 8, 2004, at 2-5.)
Petitioner is advised that the second amended petition submitted to the court for filing must
include a proof of service showing that he served a copy on respondents' counsel.

Accordingly, IT IS HEREBY ORDERED that:

1. Petitioner's December 9, 2004 amended petition is dismissed as a mixed petition filed in violation of the court's order filed November 8, 2004;

2. Petitioner is granted thirty days to file with the court and serve on respondents' counsel a second amended petition that contains only petitioner's exhausted claim concerning his confession; petitioner's second amended petition must bear the docket number assigned to this case and must be labeled "Second Amended Petition;

3. Respondents shall file and serve an answer to petitioner's second amended petition within thirty days after the second amended petition is served; and

4. Petitioner's traverse, if any, shall be filed with the court and served on respondents' counsel within thirty days after respondents' answer is served.

DATED: June 27, 2005.



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

DAD:13
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